UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEPHEN N. WARE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-170-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether the commissioner properly found that the plaintiff, who alleges that he has been disabled from working since August 1, 1989 by mild mental retardation and/or borderline intellectual functioning, adjustment disorder with depressed mood and a learning disability, was not disabled as of September 30, 1991, his date last insured. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 21, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain insured only through September 30, 1991, Finding 1, Record at 14; that as of his date last insured he had no impairment that significantly limited his ability to perform basic work-related functions and therefore did not have a severe impairment, Finding 4, *id*.; and that, therefore, he was not under a disability at any time through his date last insured, Finding 5, *id*. The Appeals Council declined to review the decision, *id*. at 4-6, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

The plaintiff, who has been determined to be disabled for purposes of Supplemental Security Income ("SSI") benefits, complains that the administrative law judge failed to comply with Social Security Ruling 83-20 ("SSR 83-20"), which requires determination of the onset date of disability. *See* Itemized Statement of Errors ("Statement of Errors") (Docket No. 9) at 2-5. He argues, in addition, that the administrative law judge's Step 2 finding of non-severity is unsupported by substantial evidence. *See id*. at 5-6. I find no reversible error.

I. Discussion

A. Failure To Comply With SSR 83-20

At the outset of his decision, the administrative law judge acknowledged that the plaintiff was receiving SSI benefits "based on a determination that he became disabled several years after the expiration of his insured status." Record at 11. Nonetheless, he did not cite or otherwise purport to apply SSR 83-20, which provides:

> In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability. In many claims, the onset date is critical; it may affect the period for which the individual can be paid and may even be determinative of whether the individual is entitled to or eligible for any benefits.

SSR 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 49.

A failure to apply SSR 83-20 is error; however, it has been held not to constitute reversible error if the rule's dictates nonetheless are heeded. *See, e.g., Field v. Shalal* [sic], No. CIV. 93-289-B, 1994 WL 485781, at *3 (D. N.H. Aug. 30, 1994) ("The ALJ's failure to explicitly rely on SSR 83-20 does not by itself require remand. In this case, however, the ALJ's reasoning also fails to comport with SSR 83-20's substantive requirements.") (citation omitted). In this case I find that those dictates were followed.

SSR 83-20 contemplates the possibility that, to infer onset date, a process of inference may be necessary, providing:

> In some cases, it may be possible, based on the medical evidence to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination, e.g., the date the claimant stopped working. How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in the particular case. This judgment, however, must have a legitimate medical basis. At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred. If there is information in the file indicating that additional medical evidence concerning onset is available, such evidence should be secured before inferences are made.
>
> If reasonable inferences about the progression of the impairment cannot be made on the basis of the evidence in file and additional relevant medical evidence is not available, it may be necessary to explore other sources of documentation. Information may be obtained from family members, friends, and former employers to ascertain why medical evidence is not available for the pertinent period and to furnish additional evidence regarding the course of the individual's condition. . . .
>
> The available medical evidence should be considered in view of the nature of the impairment (i.e., what medical presumptions can reasonably be made about the course of the condition). The onset date should be set on the date when it is most reasonable to conclude from the evidence that the impairment was sufficiently severe to prevent the individual from engaging in SGA (or gainful activity) for a continuous period of at least 12 months or result in death. Convincing rationale must be given for the date selected.

Id. at 51-52.

While, as the plaintiff observes, *see* Statement of Errors at 3, the administrative law judge never explicitly inferred any onset date, he implicitly found that the onset date postdated the date last insured, *see* Finding 4, Record at 14. Inasmuch as (i) that implicit finding was supported by substantial evidence, and (ii) the decision in other material respects comports with the dictates of SSR 83-20, no useful purpose would be served in remanding the case for purposes of fixing a precise onset date.

The court in *Field* held that the administrative law judge flouted the requirements of SSR 83-20 in

failing either to (i) assess whether the claimant's alleged onset date conflicted with other evidence of record or (ii) retain a medical advisor to assist him in inferring a reasonable onset date and determining whether that date was consistent with the claimant's allegations. *Field*, 1994 WL 485781, at *3.

In this case, by contrast, the administrative law judge weighed whether the medical and other evidence of record conflicted with the alleged onset date. With respect to the medical evidence, he accurately observed that:

1. In May 1986 – prior to the alleged onset date – the plaintiff was treated at the Augusta Mental Health Institute ("AMHI") for what was assessed as a "brief" episode of adjustment reaction, with no evidence of mental illness and no depression noted upon discharge. *See* Record at 12, 384, 386.[2]

2. There is no indication that the plaintiff required any further mental-health treatment until 1999, when he experienced acute symptoms of depression and psychosis after he abruptly ceased a longtime habit of marijuana use. *See id*. at 12-13, 153, 321-22.

3. Medical records from the relevant period, when the plaintiff sought emergency-room treatment for various physical conditions, reveal no significant medical (or mental-health) condition. *See id*. at 13, 127-41.

4. Although a WAIS-III test administered in July 2001 indicated that the plaintiff's intellectual functioning was in the borderline to mentally retarded range, the psychologist who administered the test, Mary Alyce Burkhart, Ph.D., speculated that a lack of effort may have contributed to his low test scores. *See id*. at 13, 204-05.

[2] The Record indicates that the plaintiff was treated at AMHI from May 5-26, 1986, shortly after his girlfriend moved out of their home, taking their infant daughter with her. *See* Record at 380-81, 384. His discharge diagnoses were adjustment disorder with depressed mood and substance abuse, mixed. *See id*. at 381.

With respect to the non-medical evidence, the administrative law judge also accurately noted that the plaintiff had been able to work for a number of years (prior to the alleged onset date) and independently raise two children (during and after the relevant period). *See id*. at 13, 28-29, 90. He supportably found these facts to argue against a conclusion that the plaintiff was mentally retarded prior to his date last insured. *See id*. at 13, 206, 222, 226.[3]

Finally, in contrast to the administrative law judge in *Field*, the administrative law judge took the precaution of calling upon the services of a medical advisor, psychiatrist Ulrich B. Jacobsohn, M.D., at hearing for purposes of ascertaining whether the plaintiff was disabled by mental impairment(s) during the relevant period. *See id*. at 16, 33-38, 73. As the administrative law judge pointed out, *see id*. at 13, Dr. Jacobsohn indicated there was insufficient evidence to permit him to form an opinion concerning the plaintiff's condition as of September 1991, *see id*. at 34-35, 37-38. In short, after considering the factors identified as relevant in SSR 83-20 and drawing upon the resources of a medical advisor as SSR 83-20 advises, the administrative law judge determined (in essence) that the onset of the plaintiff's disabling mental impairment(s) postdated his date last insured. As noted above, that conclusion is well-supported by the evidence of Record.

One further point merits discussion. The plaintiff asserts that although Dr. Jacobsohn "complained that the [1986 AMHI] record was incomplete," the administrative law judge failed to recess to obtain the missing records. Statement of Errors at 4. As counsel for the plaintiff suggested at oral argument, SSR 83-20 imposes an affirmative (and heightened) duty on an administrative law judge to obtain such additional

[3] In his Statement of Errors, the plaintiff complains that "whether [he] suffered from mild mental retardation or borderline intellectual functioning, neither is addressed in the Decision, nor at all seemingly considered in the question of the onset of disability." Statement of Errors at 5. This is not a fair characterization of the decision, which, as discussed above,
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medical evidence concerning onset date of disability as the file indicates is available. *See* SSR 83-20, at 51. Counsel for the commissioner conceded that the administrative law judge made no attempt to obtain the missing records.

Nonetheless, even assuming *arguendo* that the administrative law judge thereby erred, the First Circuit has signaled that a claimant must make a showing of prejudice to warrant remand on the basis of failure to develop the record. *See Faria v. Commissioner of Soc. Sec.*, No. 97-2421, 1998 WL 1085810, at **1 (1st Cir. Oct. 2, 1998) (affirming district court's denial of Social Security appeal in case in which claimant had not shown how he was prejudiced by administrative law judge's failure to secure treatment notes or ask further questions); *see also, e.g., Nelson v. Apfel*, 131 F.3d 1228, 1235 (7th Cir. 1997) (claimant who "fail[s] to point to any specific facts that were not brought out during the hearing, and fail[s] to provide any new medical evidence" has not shown prejudice; "Mere conjecture or speculation that additional evidence might have been obtained in the case is insufficient to warrant a remand.") (citation and internal quotation marks omitted) (cited with favor in *Faria*).

In this case, the plaintiff falls short of making the requisite showing. His counsel suggested at oral argument that it is apparent from the face of the hearing transcript (specifically, Dr. Jacobsohn's remarks) that the AMHI records both exist and would have made a material difference. Assuming *arguendo* that the records are indeed obtainable, I am unpersuaded that Dr. Jacobsohn's remarks demonstrate that their absence was prejudicial. While Dr. Jacobsohn questioned the accuracy of the 1986 AMHI diagnosis and observed that the Record contained only the discharge summary (omitting numerous pages of nursing and other notes), he did not state that the missing records were pivotal, would likely resolve his questions or

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addressed the WAIS-III scores but supportably discounted their validity.

would likely shed light on the date of onset. *See* Record at 36-37. Indeed, he pointedly "complained" not about the missing 1986 records but about the gap between the 1986 and the 1999 episodes of treatment. *See id*. at 34-35 ("[I]t would be very, very difficult, and almost impossible to go to the bridge that covers the period [19]89 to [19]91, based on those two hospitalizations with no information of how he was functioning in between."). The plaintiff has not suggested that any additional medical records are available for that gap period.

In summary, while the administrative law judge's handling of the matter of onset date of disability is indeed flawed, I do not discern reversible error.

B. Step 2 Finding

The plaintiff next posits that the administrative law judge erred in finding that he had failed to meet the *de minimis* Step 2 burden of demonstrating that his mental impairments would have had more than a minimal impact on his ability to work during the relevant period. *See* Statement of Errors at 5-6. I am unpersuaded.

As an initial matter, the plaintiff argues that the administrative law judge wrongly characterized Dr. Jacobsohn as having concluded there was insufficient evidence to establish the existence of mental illness. *See id*. The plaintiff asserts that "Dr. Jacobsohn's testimony, more fairly read, was that he could not form an opinion without additional records which he felt were readily available." *See id*.

Dr. Jacobsohn did indeed suggest that he could not form an opinion without additional records; however, he never described such records as "readily available." *See* Record at 34-35, 37-38. In fact, he suggested that records for the period from the 1986 to the 1999 hospitalizations (rather than the additional records from the 1986 hospitalization) were pivotal. *See id*. Neither Dr. Jacobsohn nor anyone else has

asserted that such records exist, let alone that they are readily available.[4]

The plaintiff finally argues that the administrative law judge erred in determining his intellectual-functioning impairment to have been non-severe as of his date last insured on the basis of his purported lack of effort on the WAIS-III test. *See* Statement of Errors at 6. As the plaintiff observes, *see id.*, Dr. Burkhart noted that "[e]ven if one assumes [the plaintiff's] intellectual potential is in the borderline range of intellectual functioning, he has limited intellectual strength to apply to work-related activities," *see* Record at 206, and at least one Disability Determination Services ("DDS") non-examining consultant rated him as suffering moderate difficulties in maintaining concentration, persistence and pace, *see id.* at 350.

Nonetheless, substantial evidence supports the administrative law judge's finding that any intellectual-functioning impairment was non-severe as of the plaintiff's date last insured. Two DDS consultants, David R. Houston, Ph.D., and Scott Hoch, Ph.D., were asked to assess the plaintiff's mental impairments both currently and as of his date last insured. *See id.* at 44, 208, 340. While both found that the plaintiff's mental impairments then moderately affected his ability to maintain concentration, persistence and pace, both concluded that there was insufficient evidence to assess the impact of the plaintiff's mental impairments as of his date last insured. *See id.* at 218, 221, 350, 352.

What is more, the administrative law judge supportably found the WAIS-III scores inconsistent with the plaintiff's level of functioning during the relevant time, including his ability to raise his two children independently. *See id.* at 13, 206, 222, 226. In addition, although not mentioned by the administrative law judge, Dr. Jacobsohn testified at hearing that there was a probability that the plaintiff's IQ had been affected by, and declined as a result of, the major mental illness he had suffered in 1999. *See id.* at 39-40.

[4] Nor, for that matter, did Dr. Jacobsohn indicate that the missing 1986 AMHI records were readily available. *See*

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The administrative law judge accordingly supportably found the plaintiff's mental impairments to have been non-severe as of his date last insured.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of June, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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